



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 80 OF 2018

EJT.....PLAINTIFF

VERSUS

JKL.....DEFENDANT

RULING

1. The defendant filed a notice of preliminary objection dated 29th May 2018 on the grounds that;
 - a) The court lacks jurisdiction.
 - b) The procedure of instituting the suit by way of plaint is misconceived and should be by way of originating summons.
 - c) The parties herein are husband and wife and the property is not subject to division in the life of marriage between the spouses.
2. The applicant submitted that section **17 of the Matrimonial Property Act** provides that the procedure of instituting a suit in matrimonial property is vide an application, specifically originating summons and not by way of plaint.
3. The applicant further submitted that the plaintiff and defendant are husband and wife as per the **marriage certificate serial no.[.....]**. Citing **section 7 of the Matrimonial Property Act** and the case of **Kobilo Chepok v Francis Chepok Tuwei (2018) eKLR** where the suit was struck out as the parties were still married.
4. The respondent submitted that there is no dispute that the properties in issue belong to the parties and that they entered into an agreement on how their relations and the properties would be governed. That the defendant acknowledges the agreement and the parties are bound by that agreement. Further that they are currently living separately and they intend to own their properties separately. She cited **section 12** in support of this submission and further stated that they have consented to what they intended to gift to one another.
5. She further referred to section **15 of the Matrimonial Property Act** which deals with gifts during the subsistence of the marriage. It is submitted that any attempt to disown the agreement amounts to dishonesty. She relies on section 120 of the Evidence Act and Article 10 of the Constitution of Kenya in regard to the agreement.

ISSUES FOR DETERMINATION

- a) **Whether the court lacks jurisdiction to entertain this suit**
- b) **Whether the suit should be struck out for being defective as it was instituted by way of Plaint**
- c) **Whether the property is subject to division in the life of marriage between the spouses**

WHETHER THE COURT LACKS JURISDICTION TO ENTERTAIN THIS SUIT

6. The applicant submitted that the court did not have jurisdiction as the division of matrimonial property is to be done by the High Court Family Division.

Section 17 of the Matrimonial Property Act provides;

(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

7. By virtue of **section 17(1)** the court has jurisdiction to handle the suit as the Family Division court is part of the High Court. Further, there is no express provision on the jurisdiction of the Family Division having to handle matters concerning Matrimonial Property.

WHETHER THE SUIT SHOULD BE STRUCK OUT FOR BEING DEFECTIVE AS IT WAS INSTITUTED BY WAY OF PLAINT

8. The applicant contended that the suit was to be instituted by way of Originating Summons claiming that section 17 of the Matrimonial Property Act expressly provides for this procedure. However, that is not correct because **Section 17 of the Matrimonial Property Act** only states that the application shall be made in accordance with such procedure as may be prescribed.

In **Milcah Munich Munoko v Lawrence Ochokolo Oduma [2016] eKLR** the court was faced with a similar situation where the suit had been instituted by way of Originating Summons instead of a plaint and held;

The Court noted, and as also pointed out by both Parties, that the **Matrimonial Property Act** does not give the procedure or the mode of institution of any such proceedings under the Act and the same has thus been left to the parties and the Courts. It follows therefore that there is no explicitly outlined procedure to be followed in instituting proceedings under the Act and hence, this Court cannot dismiss a litigant on the basis that he or she ought to have instituted such proceedings using a particular mode as opposed to another.

9. In the spirit of **Article 159** of the Constitution, which makes it clear that substance must be given deference over technical procedure and I hold and find that the suit is not fatally defective for being instituted by way of Plaint.

WHETHER THE PROPERTY IS SUBJECT TO DIVISION IN THE LIFE OF THE MARRIAGE BETWEEN THE SPOUSES

10. The plaint seeks court orders to subdivide the properties between the two parties. Regardless of the existence of an agreement, the orders sought compel the court to divide the matrimonial property. Section 7 of the Matrimonial Property Act provides;

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

11. What the plaintiff seeks is, essentially, the distribution of the property between herself and her husband but by virtue of the fact that they are not yet divorced, the property cannot be distributed between them.

12. In **T M W v F M C, Matrimonial Cause 3 of 2018 [2018] eKLR** the court held;

In the premises, I'm of the view that the Petitioner herein is entitled to a share which may not be equal to that of the Respondent if at all the matrimonial property is to be distributed. The suit property herein cannot be subject to distribution without proof of divorce."

13. The upshot of the foregoing is that in the absence of proof of divorce the court's hands are tied with regards to distribution of the property. On the strength of this limb alone, the preliminary objection is merited.

Delivered and dated this 19th day of December, 2019 at Eldoret

H.A. OMONDI

JUDGE

In the presence of:-

Mr. Aseso holding brief for Dr. Chebii for the Plaintiff

Mr. Kipkurui holding brief for Miss Tum for the Defendant

